STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Fitzgerald, PJ and Bandstra and Kelly, JJ

ANNABELLE R. HARVEY, Beneficiary and successor of Paul Harvey, deceased, and MICHAEL F. MERRITT, Judge, retired, substituted for Bruce A. Fox, Judge, retired.

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, STATE OF MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, STATE OF MICHIGAN BUREAU OF RETIREMENT SYSTEMS AND THE JUDGES' RETIREMENT BOARD FOR THE STATE OF MICHIGAN, JOINTLY AND SEVERALLY,

Defendants-Appellants.
_____/

Supreme Court No. 121672

Court of Appeals No. 227140

Ingham Circuit No. 94-77760-AZ
(Formerly on remand from Court of Appeals No. 187112)

BRIEF ON APPEAL-APPELLANTS

ORAL ARGUMENT REQUESTED

"THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID"

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I. **Did the Court of Appeals err in finding that the intermediate scrutiny test should be used in determining whether the statutory scheme set forth in the Judges Retirement Act violates equal protection?**

II. **Did the Court of Appeals err in finding that the statutory scheme set forth in the Judges Retirement Act violates equal protection?**

III. **Did the Court of Appeals err in remanding the case to the trial court, rather than deciding whether the Plaintiffs have an appropriate remedy?**

INTRODUCTION

This case involves the Judges Retirement Act 1992 PA 234, MCL 38.2101, *et seq* ("Act 234"). Plaintiffs claim that Act 234, as it relates to retirement benefits paid to district court retirees who were not employed by the 36th District Court, violates the Equal Protection Clause of the Michigan Constitution. In particular, the Plaintiffs contend that 36th District Court retirees receive a greater retirement allowance under Act 234 than non-36th District Court retirees. Plaintiffs thus requested the court to declare Act 234 to be unconstitutional and to enjoin its application. In addition, the Complaint sought the award of "incidental damages" including "such benefits and pay Plaintiffs ought to have received...and return of all monies improperly paid...."

This matter affects more individuals than just the two named Plaintiffs. The issues presented could affect more than 1000 people, including all circuit, district and probate judges, both retired and active, and their beneficiaries. The financial ramifications to the Judges Retirement System (JRS) could be enormous.

In deciding the significant issues, the Court of Appeals erroneously applied the intermediate "substantial relationship" standard. In any event, Act 234 does not violate the Equal Protection Clause regardless of whether it is measured by the substantial relationship test or the rational basis test. Nevertheless, even if this Court were to declare that Act 234 violates the Equal Protection Clause, it cannot grant the monetary relief requested by the Plaintiffs because only the Legislature has that constitutional authority. Thus, this Court should reverse the Court of Appeals decision, which found that Act 234 was unconstitutional, and should reinstate the Circuit Court decision that dismissed the complaint.

STATEMENT OF PROCEEDINGS AND FACTS

Procedural Facts

Plaintiffs-Appellees, Annabelle R. Harvey, beneficiary of Paul Harvey, a deceased district court judge, and Michael Merritt, a retired district court judge, (collectively, "Plaintiffs") filed a summons and complaint in the 30th Judicial Circuit Court in June 1994. Plaintiffs' complaint alleged that the State of Michigan's system for funding pension benefits, paying retirement benefits and paying salaries for district court judges discriminated against non-36th District Court Judges in violation of their Michigan equal protection guarantee, Const 1963, art 1, § 2. Plaintiffs alleged in the Complaint that the formula for calculating a retirement allowance discriminated against non-36th District Court Judges. This was because it was based on the final salary received by district court judges. For 36th District Court Judges this was their entire salary because the State paid their full salary, whereas non-36th District Judges, who received a state portion and a local portion of their final salary, could not include the local portion of their salary. In addition, the Plaintiffs alleged that non-36th District Court Judges contributed more to their retirement than 36th District Court Judges under Act 234 and non-36th District Judges were paid less than 36th District Court Judges (App., p. 40a). Plaintiffs are no longer pursuing allegations that non-36th District Court Judges are paid less than 36th District Judges (App., p. 34a). Moreover, the only allegation from the Complaint still at issue is whether the retirement allowance paid to 36th District Court Judges violates the Equal Protection Clause (App., p. 34a).

On November 2, 1994, Defendants filed a Motion for Summary disposition pursuant to MCR 2.116(C)(4) and Brief in Support arguing that the Plaintiffs had requested money damages from the State in the Circuit Court, and only the Court of Claims had jurisdiction over money damage claims (App., p. 2a, Docket No. 11). On or about December 7, 1994, Plaintiffs filed

Motions for Class Certification and Summary Disposition pursuant to MCR 2.116(C)(10) along with an accompanying Brief (App., p. 2a, Docket No. 12). On February 25, 1995, Defendants filed an Answer and Brief in Opposition to Plaintiffs' Motion along with a Brief in Support of their Motion for Summary Disposition (App., p. 3a, Docket No. 23). Oral arguments were heard on May 3, 1995.

In its bench Opinion of May 3, 1995, the Circuit Court held "that the funding scheme, to the extent that it must be tested against one of the traditional criteria, that the criterion would be the lowest, i.e., whether it bears a rational relationship to a legitimate state interest" (App., p. 20a). The Circuit Court also found that the system did not violate either the United States or Michigan Constitutions based on *Taylor v Auditor General*, 360 Mich 146; 103 NW2d 769 (1960), and based on Const 1963, art 6, §§18 & 26 (Tr 26-27). Reading these two provisions together, the Circuit Court held that the only constitutional requirement was that district judges' compensation be uniform within the district or county. By implication, there is no other requirement of uniformity; therefore, the Michigan Constitution and United States Constitution equal protection provisions were not violated. On June 7, 1995, the Circuit Court entered its Order granting Summary Disposition in favor of Defendants (App., p. 20a).

On June 22, 1995, Plaintiffs appealed the Circuit Court's Decision to the Court of Appeals by Claim of Appeal (App., p. 17a, Docket No. 1). After briefing and oral argument, the Court of Appeals on January 3, 1997, issued an Opinion that reversed the Circuit Court, holding that the Circuit Court erred in utilizing the "rational basis" test in deciding the case and should have used the "intermediate standard." The Court of Appeals remanded the case to the Circuit Court for proceedings consistent with its Opinion (App, p. 22a).

On remand, both parties filed Motions for Summary Disposition pursuant to MCR 2.116(C)(10). (App., p. 9a, Docket Nos. 96, 107). On March 29, 2000, the Circuit Court issued its Opinion and Order granting Defendants' Motion and denying the Plaintiffs' Motion, finding that Plaintiffs had not been denied equal protection of the law (App., p. 24a). The Circuit Court, following established case law in Michigan, examined the entire statutory funding system relating to pension benefits available to retired district court judges and determined that there was no statutory impediment to non-36th District Court Judges receiving equal pension benefits compared to 36th District Court Judges.

Plaintiffs appealed the March 29, 2000 Circuit Court Decision to the Court of Appeals (App., p. 14a, Docket No. 1). On May 10, 2002, the Court of Appeals reversed the Circuit Court, finding that the statutory system for district court judges contained in the Judges Retirement Act violated the Equal Protection Clause. (App., p. 34a). While the Court of Appeals held that the Circuit Court erred in failing to apply the intermediate level of scrutiny, the court did not apply this test either. Instead, the court reversed simply because "the statute challenged has guaranteed to the 36th District Court Judge retirees a level of retirement benefits that is not guaranteed to outstate judges" (App., p. 38a). Again, the Court of Appeals remanded to the Circuit Court to determine the "appropriate remedy, if any, that might be afforded to plaintiffs." The Court of Appeals also requested the Circuit Court to rule whether the Circuit Court had subject matter jurisdiction and whether there were any remedies available to Plaintiffs.

Defendants filed an Application for Leave to Appeal to this Court on May 31, 2002, along with a Motion for Immediate Consideration (App., p. 16a, Docket No. 36). On November 19, 2002 this Court issued an Order granting the Defendant's Motion for Immediate

Consideration and Application for Leave. This Court directed the parties to include among the issues briefed:

> (1) the applicable level of scrutiny under [the] Fourteenth Amendment analysis, (2) the current viability, if any, of *Manistee Bank v McGowan,* 394 Mich 655 (1975) and (3) this Court's ability to order the relief requested, *inter alia* fully state-funded pensions for outstate judges, prospectively and retroactively, in light of Const 1963, art 1, § 2, art 3 § 2, art 4 § 1; *Lewis v Mich,* 464 Mich 781, 786-787 (2001); see also *North Ottawa Hospital v Keift,* 457 Mich 394, 408 n 141 (1998); *77th Dist Judge v Mich,* 175 Mich App 681 (1989).
> (App., p. 39a)

Substantive Facts

In the early 1980s, the Legislature recognized the practical need for State government to streamline court operations and eventually assume the cost of the State's judicial system. The desirability of such an approach was due to an increase in the number of cases backlogged throughout the State and a reduced ability of local units of government to meet the cost of court operations. In addition, the Legislature aimed to lessen and to eventually eliminate any disparity in judicial salaries among the different districts that was being caused by the State's dual salary system. (App., p. 79a).

To further these aims, the Legislature passed a package of six acts known collectively as the Court Reorganization Act of 1980, 1980 PA 438 through 1980 PA 443 (from which the changes to Act 234 were made). It was the Legislature's intent to assume the costs of all court operations for five specified fiscal years, if financially able. 1980 PA 438, the former MCL 600.9947(2), provided that "if the legislature does not appropriate sufficient funds to comply with subsection (1) for any fiscal year, the funds which are necessary for the continued implementation of sections . . . shall terminate on September 30 of the fiscal year immediately preceding the fiscal year for which sufficient funds have not been appropriated." See *Grand Traverse Co v Michigan*, 450 Mich 457; 538 NW2d 1 (1995).

1. Reorganization of Detroit and Wayne County Courts

The City of Detroit and Wayne County were the logical places for the State to start assuming a greater role in the operational costs of the court system. The court structure differed markedly in Wayne County and the City of Detroit from that elsewhere in the State. There was no district court in Detroit and what would have been district court functions in other counties were accomplished by the Recorders and Common Pleas Courts. The Legislature recognized that the existence of several different court establishments within Wayne County and the City of Detroit had led to inefficiency in the administration of justice and duplications in court services and functions. Furthermore, the situation also led to redundancy in the taxation of county and city residents. Detroit residents, through their city and county taxes, contributed to the operation of the Recorders and Common Pleas Courts, as well as the Wayne Circuit Court, while out-county Wayne residents paid taxes to operate their local district courts as well as the Circuit, Recorders and Common Pleas courts. (App., p. 79a).

To address the problems facing Wayne County and Detroit and to pave the way for State funding of trial court operations, the Legislature concluded that the courts in Wayne County and Detroit should be reorganized with the help of much-needed State money. The Legislature accomplished this by merging the administrative functions of the Wayne Circuit and Detroit Recorders Courts and abolishing the Recorders' Traffic and Ordinance Division and the Detroit Common Pleas Court and replacing them with the District Court for the City of Detroit, known as the 36th District Court. Thus, the natural characteristics of the 36th District Court distinguish it from other districts based on its origin and history. Upon its creation, the judges of the 36th District Court consisted of those judges of the now-abolished Common Pleas Court.

Further, the creation of the 36th District Court required the expansion of the court through the election of more judges to that bench. This created a problem as to how to provide a pension system for the "existing judges" (those from the former Common Pleas Court) and the newly elected judges. Since Wayne County no longer had any financial connection to the newly created 36th District Court, due to the State taking over the funding of the court, the county pension system would not include these judges. Likewise, the City of Detroit's pension system would not include these judges since they were not city employees. Also, the fact that these judges were neither county nor city employees would severely limit the input these judges could have in the operation and management of these pension systems.

To remedy this situation and not to disadvantage the 36th District Court bench, the Legislature determined that all 36th District Court judges were to become members solely of the Judges Retirement System, 1951 PA 198, section 14(5); 1992 PA 234, section 503(2)(c). (App., p. 92a). In this way, the incoming judges would become part of a pension system that had a financial connection to the operation of the court.

2. Classifications of Judges under the Judges Retirement Act

All district judges fall within one of the defined "plan members", as that term is defined in section 108 of act 234, 1992 PA 234, MCL 38.2108. The reason for dividing district judges into plan members is because of the judges' dual salary system. All district judges receive two salaries: a State-paid salary and a locally-paid salary[1]. The Plaintiffs in this case are Plan 3

[1] This system has since been expended to all local units of government to further reduce disparity in judicial salaries throughout the State and to increase the State's role in assuming the costs of operating the court system. Analyses, HB 5711, HB 5748 and HB 5744 (January 23, 1981). See also 1994 PA 288, section 605.

members, as are a majority of circuit and district court judges. Plan 5 members are 36th District Court judges.

In accordance with this dual salary system, almost all judges, including Plaintiffs, belong to two retirement systems. There is a retirement system based on the judge's State-paid salary and, in almost all districts, there is a retirement system based on the judge's locally paid salary. The retirement system based on the judge's State-paid salary is the Judges Retirement System. The retirement system based on the judge's locally-paid salary varies from district to district. For example, Plaintiff Harvey's retirement system for his unconverted locally paid salary is the "Bay County Retirement System." Plaintiff Merritt's retirement system for his unconverted locally-paid salary is the "Municipal Employees' Retirement System." The "local system" for the 36th district court is the Judges Retirement System. The Judges Retirement System is, thus, the retirement system for all of the salary paid to 36th District Court judges.

The decision by the Legislature to allow the Judges Retirement System to be the retirement system for the locally-paid salaries of 36th District Court judges, in addition to being the retirement system for their State-paid salaries, was a discretionary one in conformity with the Legislature's plan to assist the financially troubled City of Detroit. (App., p. 92a).

Act 234 requires the Judges Retirement System to calculate the retirement benefits of 36th District Court judges based on their entire salary with the mandatory contribution being 3.5%. (App., p. 99a) Other district court judges have the option of having their State retirement benefits calculated based on (i) their State-paid salary only or (ii) their State-paid salary plus a

portion of the locally-paid salary. (App., p. 99a).[2] If they elect option (i), the mandatory contribution to the State plan is 3.5% of the State-paid salary. If option (ii) is elected, (described in the following paragraph) the mandatory contribution is 7% of the State-paid and "converted" portion of the locally paid salary. Thus, the relative attractiveness of the options depends on a particular judge's locally-established retirement plan's financial condition.

The relevant sections of Act 234 for the calculation of pension benefits for retired district court judges are MCL 38.2503 and MCL 38.2504. MCL 38.2504 allows district court judges to convert a portion of their locally-paid salary to their State-paid salary. The reason a judge may want to convert a portion of his locally-paid salary to his State-paid salary is because the Judges Retirement System could be a more favorable plan than the judge's local retirement plan. If a judge's local plan is more favorable than the Judges Retirement System, conversion would be detrimental. For example, former Plaintiff Bruce Fox would have earned a greater combined retirement allowance had he decided not to convert. In any event, former Plaintiff Fox still received a greater retirement allowance than he would have received had he been a judge of the 36th District Court. Consequently, he withdrew as a plaintiff in this case since his situation did not support Plaintiffs' claims of pension disparity and Plaintiff Merritt was substituted in his place. (App., p. 8a, Docket No. 71)

Thus, non-36th District Court judges may increase their State retirement allowance by shifting a portion of their locally-paid salary to their State-paid salary, thereby increasing their final compensation in the Judges Retirement System. The remainder of the unconverted locally

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[2] Non-36th district court judges who do not participate in a local plan or are in a local plan that does not require member contributions have the option of taking the money that they would have used for member contributions and investing it on their own. This option includes the ability to defer salary on a pre-tax basis with tax-deferred investment growth in the State's deferred compensation plan.

paid salaries of non-36th district court judges may still be used in calculating their local retirement benefits. Both Plaintiffs in this case receive a local retirement benefit based on the unconverted portion of their locally-paid salary.

3. Defined Contribution System enacted by Legislature

In December 1996, the Legislature created a defined contribution retirement plan within the Judges Retirement System. These amendments to Act 234, resulted in all newly elected or appointed judges participating in that plan at 100% of their salary. 1996 PA 523, MCL 38.2656 (App., p. 101a). Thus, from March 31, 1997, going forward, every new judge has the same opportunity to receive the same retirement benefit. As part of the same law, all judges in the Judges Retirement System as of March 31, 1997, (including each of the Plaintiffs) were provided with the option of remaining in the old system (the defined benefit or Tier 1 plan) or electing to transfer to the new plan (the defined contribution or Tier 2 plan). (App., p. 101a). This was another attempt by the Legislature to give judges more options to equalize retirement opportunities.

4. Out-state Judges can receive greater retirement benefits than 36th district judges

Important to the circuit court's determination in this case was the fact that one of the original Plaintiffs (District Judge Bruce Fox) received a higher pension benefit as a non-36th District Court judge than he would have received as a 36th District Court judge. He withdrew from the lawsuit based on this fact and was replaced by District Judge Michael Merritt. Plaintiffs admitted in their Court of Appeals' brief that there are three non-36th judicial districts in which district court judges receive retirement allowances equal to or greater than those received by 36th District Court judges. (App., p. 8a, Docket No. 71).

As stated above, the Circuit Court in 2000 reviewed the entire statutory system for funding the pensions of District Court judges and could not find, and Plaintiffs did not disclose in their pleadings, any statute that either prohibited or impeded a local funding unit from providing equal or greater pension benefits to non-36th District Court judges than 36th District Court judges. Based upon review of the entire statutory system, the circuit court granted Defendants' motion for summary disposition and denied Plaintiffs' motion. (App., p. 24a)

The Court of Appeals, however, in its Order issued May 10, 2002, limited its review to Act 234 and found, based upon its narrow review, that the Judges Retirement System affords 36th District Court judges "guaranteed" pension benefits while non-36th District Court judges are not provided the same "guarantee," in violation of equal protection. However, in place of deciding all the issues raised by the parties in this case, including the lack of remedies available to Plaintiffs, the Court of Appeals simply remanded to the circuit court to decide the issues.

ARGUMENTS

I. The Court of Appeals erroneously applied the intermediate scrutiny test instead of the rational basis test.

A. Standard of review

The standard of review for constitutional issues is *de novo*. *McDougall v Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999).

B. The proper test to be applied

1. The Equal Protection Clause in the state and federal constitutions has the same meaning.

The Michigan Constitution declares "no person shall be denied the equal protection of the laws." Const 1963, art 1, §2. The wording of the parallel clause in the US Constitution is almost identical. It provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, §1.

In *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998), this Court stated:

> Our state constitution declares "[n]o person shall be denied the equal protection of the laws...." We have interpreted our Equal Protection Clause to offer similar protection as the wording of the parallel clause in the United States Constitution. *Doe v Dep't of Social Services,* 439 Mich 650, 660; 487 NW2d 166 (1992).

Similarly, in *Crego v Coleman,* 463 Mich 248, 258; 615 NW2d 218 (2000), *cert den* 531 US 1074 (2001), this Court held that "Michigan's equal protection provision [is] coextensive with the Equal Protection Clause of the federal constitution." Thus, the Michigan Constitution offers no broader protection than its federal counterpart when it comes to an equal protection analysis.

It is also well established that, in order to have an equal protection violation, the persons involved must be similarly situated. *Plyler v Doe*, 457 US 202, 216; 102 S Ct 2382; 72 L Ed 2d 786 (1982) and *El Souri v Dep't of Social Services,* 429 Mich 203, 207; 414 NW2d 679 (1987).

Moreover, even if a law treats groups of similarly situated people differently, it will not necessarily violate the guarantee of equal protection because neither the Michigan nor the U.S. Constitution have been interpreted to require "absolute equality." *Doe v Dep't of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992), citing *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 24; 93 S Ct 1278; 36 L Ed 2d 16 (1973), *reh den* 411 US 959 (1973). Finally, the person "challenging the statute must demonstrate that it evidences intentional discrimination against a particular group of persons." *People v Conat,* 238 Mich App 134, 153; 605 NW2d 49 (1999), *lv den* 461 Mich 1013; 622 NW2d 521 (2000).

2. The standards to apply to equal protection issues.

Equal protection claims are subject to one of three standards of judicial scrutiny: (1) strict scrutiny, (2) substantial or intermediate "heightened scrutiny" relationship, or (3) rational basis. *Plyler, supra,* 457 US at 216-219; *Crego, supra,* 463 Mich at 223-224. Where a statute creates an inherently suspect classification, such as one based on race, alienation, ethnicity, and national origin, or affects a fundamental interest, the "strict scrutiny" test applies. Comparatively, certain classifications, such as gender or mental capacity, are subject to the "substantial relationship" test. *Craig v Boren*, 429 US 190, 197-198; 97 S Ct 451; 50 L Ed 2d 397 (1976); *Doe, supra,* 439 Mich at 662, n 19. The remaining classifications, such as economic and social classifications, merit the lease rrestrictive standard of review, known as the "rational basis" test. *Craig, supra*, 429 US at 207; *Doe, supra*, 439 Mich at 662.

As this Court has stated:

> Regardless of the level of scrutiny employed, an equal protection challenge requires us to make two findings: the governmental purpose behind the legislative enactment, and how closely related the law is to that purpose. *Crego, supra,* 463 Mich at 269

3. The intermediate scrutiny test retains very limited viability, but is inapplicable to the instant case.

In this Court's Order granting leave, the parties were requested to address the "current viability, if any, of *Manistee Bank v McGowan*, 394 Mich 655 (1975.)" Based on the cases issued since *Manistee Bank*, the intermediate scrutiny test established by the Court has limited applicability, and clearly does not apply in this case. Thus, the Defendants do not believe that there is any need to override this Court's decision in *Manistee Bank*, in order to grant the relief requested by the Defendants, which is to reverse the Court of Appeals' decision.

This Court developed the intermediate scrutiny test, also known as the heightened or means scrutiny test, in *Manistee Bank v McGowan,* 394 Mich 655; 232 NW 636 (1975). In *Manistee Bank,* this Court reviewed an amendment to the 1927 guest passenger statute which created a statutory exception to the general rule of common law and statutory liability for negligent driving, allegedly depriving a guest passenger due process and equal protection. As stated in the opinion, the United States Supreme Court had, at that time, developed a two-tiered approach to equal protection cases. If the interest was "fundamental" or the classification "suspect" a court applied the strict scrutiny test, requiring the state to show a "compelling" interest that justifies the classification. However, in cases that are principally social and economic, the proper level of scrutiny was the rational basis test. Under this test, the burden was on the person challenging the classification to establish that it is without reasonable justification.

In *Manistee Bank, supra,* this Court looked at an emerging scrutiny test that was being used by the United States Supreme Court in their 1971 term, which eventually became known as the intermediate scrutiny test. The test is whether the legislation is substantially related to an important state interest, with the burden on the legislative body to show that the legislation is substantially related to an important state interest. This Court adopted the test, limiting the use of

the test to cases where the challenged statute "carves out a discrete exception to a general rule and the statutory exception is no longer experimental." *Id.,* 394 Mich at 671.

While the intermediate scrutiny test was originally developed for specific instances where a "discrete exception" to a general rule is "carved" out of a statute and the statute is no longer considered experimental, the courts of this state and federal courts have since limited the use of this test to a few select types of cases. As this Court stated in a footnote in *Doe, supra*, 439 Mich at 663, n 19, "[t]ypically, this middle tier has been applied to classifications based on gender or mental capacity." For example, in *Metro Broadcasting Inc v Federal Communications Commission,* 497 US 547; 110 S Ct 2997; 111 L Ed 2d 445 (1990), the United States Supreme Court used the intermediate scrutiny test in a case involving preferences granted to minority applicants for radio and television licenses. Federal courts continue to apply the intermediate scrutiny test in limited situations.

The only Michigan case uncovered by the Defendants involving gender and the use of the intermediate scrutiny test is *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173; 387 NW2d 821 (1986). The defendant Waterford Township operated a basketball program for elementary school children that separated the children by gender and assigned each gender different seasonal schedules. The Department of Civil Rights determined that this program discriminated on the basis of sex because of separate teams and schedules for boys and girls. The Court applied the intermediate scrutiny test, yet concluded that because there was a paucity of facts developed in the case, remanded the matter back to the trial court.

The Defendants were unable to find any Michigan cases involving the use of the intermediate scrutiny test in mental capacity matters. Regarding equal protection cases involving

illegitimacy issues, there have been a small number of cases reported. The most recent case involving this Court and the issue of illegitimacy is *Crego v Coleman, supra.* In this case, which had been before the Court of Appeals on three occasions, this Court used both the rational basis test and the intermediate scrutiny test in ultimately determining that the statute at issue did not violate the equal protection clause. In another case involving illegitimacy, *Frame v Nehls*, 452 Mich 171; 550 NW2d 739 (1996), this Court rejected the use of the intermediate scrutiny test, as had been applied by the Court of Appeals, by classifying the case as only incidentally relating to illegitimacy, and applied the rational basis test. The status of the intermediate test was best summarized by the Court of Appeals in *Neal v Oakwood Hospital Corp,* 226 Mich App 701, 718; 575 NW2d 68 (1997), where the Court observed, "the trend has been away from the substantial relationship [intermediate] test for cases that do not involve fundamental rights or suspect classifications."

Thus, the state courts are moving away from the use of the intermediate test enunciated in *Manistee Bank,* and have, instead, looked at whether the classification at issue involves a fundamental interest or a suspect classification, and if not, then the rational basis test is used. Moreover, when used, the intermediate scrutiny test is only applied in cases involving gender or illegitimacy. Therefore, the applicability of the intermediate test set forth in *Manistee Bank* is extremely limited, and simply not applicable to the retirement issues at stake in the instant matter.

4. Rational basis test.

Despite the limited applicability of the intermediate scrutiny test and an entire line of cases from both this Court and the U.S. Supreme Court that hold the rational basis test must be used in economic equal protection cases, the Court of Appeals determined that the intermediate scrutiny test should apply to the statutory system at issue here. The Court of Appeals decision

directly contravenes this Court's holding in *Hughes v Judges' Retirement Bd,* 407 Mich 75, 93-95; 282 NW2d 160 (1979), where this Court unanimously held that in equal protection actions regarding judges' retirement matters, the rational basis test must be applied. This Court of Appeals decision is also contrary to other retirement cases. See, *In Re Retirement System,* 213 Mich App 701, 705; 540 NW2d 784 (1995) and *Burns v US Railroad Retirement Bd,* 226 US App DC 182, 199-200; 701 F2d 193 (1983).

Plaintiffs did not plead, nor did they prove, that they fall within an inherently suspect class. Further, the receipt of retirement benefits is not a fundamental right accorded protection under the highest level of scrutiny. *See Dillinger v Schweiker*, 762 F2d 506, 508 (CA 6, 1985). ("Since a social security retiree does not fall within a suspect class, and receiving social security benefits is not a fundamental right, strict scrutiny of the 1977 amendments is not the proper level of judicial review.") Likewise, Plaintiffs' claims are not entitled to the intermediate "substantial relationship" test because their claims do not involve gender or mental capacity issues, or anything similar. Instead, Plaintiffs' equal protection claims focus entirely on their retirement allowance (in other words, economic claims) and these are subject to the "rational basis" test.

Historically, the Equal Protection Clause has been interpreted by the State and federal courts to protect disadvantaged groups and those persons and entities that do not have access to the political process. In *Plyler, supra,* 457 US at 216, n 14, the U.S. Supreme Court noted that the protections afforded by equal protection claims have been to groups that have historically been relegated to such positions of political powerlessness as to command extraordinary protection from the majoritarian political process. The federal courts have been stringent in their protection of groups disfavored by virtue of circumstances beyond their control and which suggest class or caste treatment. See, *San Antonio School Dist v Rodriguez,* 411 US 1; 93 S Ct

1278; 36 L Ed 2d 16 (1973); *Graham v Richardson,* 403 US 365; 91 S Ct 1848; 29 L Ed 2d 534 (1971); and *United States v Carolene Products Co,* 304 US 144; 58 S Ct 778; 82 L Ed 1234 (1938).

Clearly, the district, probate and circuit court judges in Michigan are not disadvantaged or without redress to the political process. There is no suspect class based on circumstances beyond their control that envelops the district court judiciary and transforms them into some class system with disparate treatment for which they have no legislative redress. This matter involves solely money issues that must be in accordance with *Hughes, supra,* 407 Mich at 93-95, reviewed under the rational basis test.

The constitutionality of economic or social legislation has consistently been challenged under the rational basis test. Benefits are considered economic or social legislation. See *Fielder v Cleland,* 433 F Supp 115, 118 (ED Mich, 1977), which stated that education benefits qualify as social and economic benefits triggering rational basis analysis. Moreover, retirement benefits have regularly been considered economic or social legislation. *United States Railroad Retirement Bd v Fritz,* 449 US 166, 175; 101 S Ct 453; 66 L Ed 2d 368 (1980). In *Fritz,* the Railroad Retirement Act restructured the railroad retirement system that retained a classification of railroad workers who continued to receive a windfall of both social security and railroad retirement benefits. Another class of workers, however, was excluded. The *Fritz* Court found that the Railroad Retirement Act was social and economic legislation, and the rational basis standard was the appropriate level of review, thus:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." [*Fritz* at 175, quoting *Lindsley v Natural Carbonic Gas Co,* 220 US 61, 78 (1911)]

The U.S. Supreme Court upheld the Railroad Retirement Act under the rational basis standard declaring that the "[c]ourt in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or inartfully drawn." *Id.* Additionally:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,"... because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. [*Id.* 449 US at 179; citations omitted]

Despite the well-accepted rule of law that economic and social legislation be reviewed under the rational basis test, the Court of Appeals used the flawed reasoning presented in *77th District Judge v Michigan,* 175 Mich App 681; 438 NW2d 333 (1989). In *77th District Judge, supra*, 175 Mich App at 690, the Court of Appeals stated in dicta[3] that the traditional rational basis test was not appropriate and that the more exacting test set forth in *Alexander v Detroit,* 392 Mich 30; 219 NW 2d 41 (1974), was appropriate.[4] In *Alexander, supra,* this Court set forth two "tests" to guide the judiciary's scrutiny of suspect enactments. First, a court must determine whether the enactment's classifications are based on natural distinguishing characteristics and bear a reasonable relationship to the object of the legislation, and, secondly, it must determine if

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[3] All of the Court of Appeals discussions on the test to apply were dicta and therefore not binding because the court held that the court of claims did not have jurisdiction. *77th District Judge, supra,* 700)

[4] Although the Court of Appeals applied the incorrect legal standard in *77th District Judge,* the Court correctly determined that the plaintiff lacked a judicial remedy. *Infra.*

all persons of the same class included are affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind.

The Court of Appeals in *77th District Judge* recognized that social or economic legislation is afforded rational basis scrutiny, but decided that since the retirement benefits of district court judges were not of interest to the general public, and therefore economically "mundane", the rational basis test was inappropriate. *77th District Judge,* 175 Mich App at 690 n 3. This flawed reasoning of *77th District Judge*, should be rejected by this Court because it is inconsistent with this Court's long line of cases holding that the rational basis test must be applied to matters such as this and intermediate or heightened scrutiny is applicable only in rare instances.

Research reveals few courts have applied the intermediate scrutiny test where a statute is no longer in its "experimental" stages. However, a recently decided case, *Walsh v Walsh*, Court of Appeals Docket No. 222434 (unpublished, July 31, 2001)[5] is directly on point. (App., p. 106a). In *Walsh,* plaintiff challenged the constitutionality of the Eligible Domestic Relations Order Act (EDRO Act) for equal protection reasons. Plaintiff, citing *Manistee Bank*, argued that because the statute was no longer in its "experimental" stages, the court should find that the statute does not satisfy the intermediate level of scrutiny. *Id.,*at 3. The Court of Appeals rejected this argument and held that:

> [D]espite the fact that this statement has never been expressly overruled, since the Michigan Supreme Court determined that Michigan's Equal Protection Clause offers no more protection than its federal counterpart, the Court has consistently held that "[u]nless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry . . . is whether the classification is rationally related to a legitimate governmental purpose." [*Id.*]

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[5] While an unpublished decision of the court of Appeals is not binding, its analysis may be adopted if it is persuasive and dispositive. *Genesis Center v BCBSM,* 243 Mich App 692, 696; 625 NW2d 37 (2000)

The *Walsh* case demonstrates that the intermediate level of scrutiny, as applied by the Court of Appeals, is no longer appropriate for interpreting a statute that is not in its experimental stages. Further, the *Walsh* court also noted that this Court's most recent cases have made it clear that if no fundamental right or suspect classification is involved, the rational basis standard governs. As such, because no fundamental right or suspect classification is involved in this case, the rational basis test is the appropriate test to be applied and the earlier decisions of the Court of Appeals to the contrary should be reversed.

For the reasons stated above, this Court should reverse the May 10, 2002, opinion of the Court of Appeals and rule, as required under both State and federal constitutional law, that the rational basis test must be applied in this matter.

II. The Court of Appeals erred in finding that the statutory system in the Judges Retirement Act violates the Equal Protection Clause.

A. Standard of review

The applicable standard of review of the circuit court's grant or denial of summary disposition under MCR 2.116(C)(10) is *de novo*. *Haliw v City of Sterling Heights*, 464 Mich 297, 301-302; 627 NW2d 581 (2001).

B. Analysis

1. Non-36th judges and 36th district judges are not similarly situated due to the existence of local retirement plans so there cannot be an equal protection violation.

In order to have an equal protection violation, the persons involved must be similarly situated. *Plyler,* 457 US at 217, *El Souri,* 429 Mich at 207. As set forth in more detail below, non-36th District judges are members of a variety of local retirement plans and 36th District judges cannot be members of those plans. Moreover, these local plans operate under different statutes than Act 234. As a result, some non-36th District judges actually receive more in

retirement allowances and health benefits than 36th District judges. Thus, non-36th District judges and 36th District judges are not similarly situated since different laws apply to each group and, within the group of non-36th District judges, different local retirement laws apply. As a result, they cannot be compared to determine if there is an equal protection violation.

2. Under the rational basis test, there is no equal protection violation.

Assuming for purposes of argument, that non-36th District judges and 36th District judges are similarly situated, there is still no equal protection violation. Under the rational basis standard, the challenged classification is presumed to be constitutional. *Massachusetts Bd of Retirement v Murgia*, 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976). The party challenging the legislation has the heavy burden of proving that the enactment of the legislation is irrational. *Dillinger, supra*, 762 F2d at 508. Imperfections and inequalities are acceptable so long as there is a rational basis underlying the legislation. *Id.* When determining the constitutionality of an act under rational basis, a court "must uphold the statute 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'." *Walker v Bain*, 257 F3d 660, 668 (CA 6, 2001), quoting from *Heller v Doe*, 509 US 312, 319-320; 113 S Ct 2637; 125 L Ed 2d 257 (1993). The classification challenged here certainly served a rational purpose that is, quite simply, the efficient operation of Michigan's court system within the available fiscal resources. Further, the Plaintiffs have failed to prove that any discrimination was intentional. *Conat, supra*, 238 Mich App at 153. Thus, the Court of Appeals erred in finding that Act 234 was unconstitutional.

The Court Reorganization Act was the legislative mechanism for the "takeover" by the State of the lion's share of the funding of Michigan's court system, with the starting point of the reorganization being the creation of the 36th district court. The ultimate goal of the Court Reorganization Act was the complete funding by the State of the entire court system in

Michigan. The Legislature enacted the Court Reorganization Act to streamline the court operations in the City of Detroit and to eliminate the disparity in judicial salaries. The Legislature's decision to place all judges from the newly-created 36th district court into the Judges Retirement System and provide them with a slightly different pension system than non-36th district court judges (most of whom are eligible for various local pension plans) was part and parcel of the start of the reorganization of the State's court system.

The objective and rationale of the Court Reorganization Act, including its amendments over time has been the reorganizing of the State's judicial system. In doing so the Legislature sought to accommodate pre-existing differences in local pension plans thereby satisfying the Legislature's obligation under Const 1963, art 9, §24, to not reduce the existing retirement benefits of any State judge. Moreover, it is fully rational to afford judges choices (defined benefit or defined contribution plans) in their personal best interest.

The pension plan for judges of any court (probate, district, circuit, etc.) is a conglomeration of many different factors, the effect of which is that each particular judge is under a different set of factors affecting their pension. Some of these factors include the date on which a particular judge took office, along with the amount of salary or even the type of salary upon which a particular judge chooses to have his or her pension calculated. It would be unreasonable to suggest that in order for the system to pass constitutional muster, total pension equality in every individual case must be achieved as between the 36th district court judges and the non-36th district court judges under the statutory system challenged in this case. Total equality is not what is legally required. Rather, the test involves whether there is a rational basis underlying the legislation. Defendant Judges Retirement Board has prevailed in demonstrating just that. Thus, the Court of Appeals erred in finding Act 234 unconstitutional.

Even if this Court finds that the specific provisions in Act 234 do not provide non-36th District Court judges the same retirement allowance as that afforded to 36th District Court judges, the fact remains that non-36th District Court judge pension benefits are dependent, in large measure, upon the local funding unit. In combination with the State portion and the local portion, the statutes have provided (currently in some cases and conceivably more in the future) pension benefits equal to or greater than those afforded 36th district court judges. As the lower court found, local funding units play a major role in the final pension benefits received by non-36th District Court judges. Local funding units are not prohibited from providing pension benefits equal to or greater than those afforded 36th district court judges.

In fact, Plaintiffs, themselves, have identified those districts that do provide benefits equal to or greater than 36th District Court judges. Unlike 36th District Court judges who have their benefits fixed by Act 234, local funding units have the power to provide pension benefits to district court judges equal to or greater than the benefits provided to 36th District Court judges pursuant to the relevant statutory provisions that grant them the power to provide pension benefits to their employees.

The individual differences between judges do not rise to the level of a violation of equal protection. It simply shows that through a combination of factors, some within the judges' control and some outside their control, the pension plans for non-36th District Court judges did not violate the equal protection guarantees of the Constitution. For this reason, this Court should reverse the Court of Appeals decision.

3. The Court erred by not reviewing the entire statutory system.

As mentioned above, the Court of Appeals limited its review to only Act 234, instead of properly looking at the entire statutory scheme, including the availability of local pension plans when determining the constitutionality of Act 234.

In *Drewes v Grand Valley State College*, 106 Mich App 776; 308 NW2d 642 (1981); *lv den* 419 Mich 880 (1984), the court reviewed an equal protection challenge of the Worker's Disability Compensation Act (WDCA). Under the WDCA, workers injured while employed by an uninsured contractor were not permitted to file both a workers' compensation claim and a civil damages suit against the principal who hired the uninsured contractor. The employees were limited to the sole remedy of the workers' compensation system because the WDCA considers principals of uninsured contractors analogous to employers. However, workers injured while in the employment of an insured contractor retained their right to a civil damages action against the principal who hired the insured contractor.

The *Drewes* court analyzed the WDCA under the rational basis test, because it is socioeconomic legislation. 106 Mich App at 785. The court held that the WDCA does not violate equal protection. In reaching its decision, the court made clear that the entire statutory scheme should be examined:

> The Legislature has clearly stated that, when a principal becomes liable for the payment of workers' compensation benefits, references to the principal are to be substituted for references to the employer in other sections of the act. There is no indication that the Legislature intended this to be true everywhere but in the exclusive remedy provision. While the logic of this situation may be *questioned after examination of the entire statutory scheme*, we are not allowed to substitute our ideas for the Legislature's.
> . . . .
>
> [The legitimate state interest of providing benefits to injured employees as soon as possible after the injury] is well served by holding the principal liable for workers' compensation payments where the contractor is uninsured. In return for imposing such liability without fault, the Legislature has included such principals in the category of employers, thereby granting the principal immunity from liability under traditional tort concepts. Accordingly, we hold that the legislative distinctions between employees of insured and uninsured contractors, when viewed in the *context of the entire statutory scheme*, are reasonably related to the fundamental purpose of the act. . . . The Legislature may well have intended that the principal be granted immunity from suit in exchange for the costs and

> difficulties imposed, and we do not believe that is unreasonable in the constitutional sense. [*Id.*, 784, 787; emphasis added]

This Court also reviewed the entire statutory scheme in deciding *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93; 422 NW2d 186 (1988). At issue was the constitutionality of the Local Development Financing Act (LDFA). This Court considered whether the revenues captured by local development financing authorities either unconstitutionally diverted tax revenues from taxing entities or lent the credit of the state or municipality. *Id.*, at 97. Specifically, this Court stated:

> Considering the entire statutory scheme of the LDFA, and §14 in particular, it is apparent that some pledge of credit by the municipality is envisioned. The local development financing authority is wholly a creature of the municipality; the governing body of the municipality must approve all development and tax increment financing plans;...the municipality's governing body dissolves the authority; and the municipality retains all property and assets of the authority after the satisfaction of its obligations. [*Id.*, at 128-129; citations omitted]

In fact, contrary to Plaintiffs' position and the Court of Appeals' opinion, this Court has held that it is "elementary" that courts should consider statutes of the same general subject matter as part of the same system. In *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953), this Court stated:

> It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and the courts will regard all statutes upon the same general subject matter as part of 1 system.
>
> In the construction of a particular statute, or in the interpretation of any of its provisions, *all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law.* [quoting *Remus v City of Grand Rapids*, 274 Mich 577, 581; 265 NW 755 (1993)] [emphasis added]

Moreover, the above-quoted text from *Dearborn Twp Clerk* was quoted and followed by this Court as recently as 1997. See *Council of Organizations and Others for Education About Parochiaid, Inc. v Governor,* 455 Mich 557, 574 n 13; 566 NW2d 208 (1997).

A review of Act 234 establishes that the Legislature built local retirement plans into it, showing that it is not uncommon for the Legislature to provide local governments the opportunity to supplement retirement benefits and these benefits are guaranteed. Specifically, section 504 of Act 234 states:

> (1) . . . For the purposes of the calculation of a judge's combined county, city, or district control unit retirement benefit, a judge who has not filed a written notice not to participate in the provisions of this subsection with the retirement system under this subsection or the former judges retirement system shall have the $2,250.00 of the salary standardization payment subtracted form the final average compensation figure *used to calculate the judge's county, city, or district control unit retirement benefit.*
>
> (2) . . . For the purposes of the calculation of a *judge's combined county, city, or district control unit retirement benefit,* a judge who has not filed a written notice not to participate in the provisions of this subsection with the retirement system under this subsection or the former judges retirement system shall have the additional state salary standardization payment as an addition to the judge's state base salary for computation of a retirement allowance under this act subtracted from the final average compensation figure used to calculate the judge's county, city, or district control unit retirement benefit.
>
> (3) The sum of the final compensation determined for each plan 3 member and the final average compensation figure used as the basis for determining the judge's retirement allowance as a member of a *county retirement plan or a retirement system that was established pursuant to the municipal employees retirement act of 1984*, 1984 PA 427, MCL 38.1501 to 38.1555, or that is subject to 1980 PA 443, MCL 38.841 to 38.846, shall not exceed the judge's total annual salary payable from all sources at the time of his or her retirement. [MCL 38.2504(1)-(3); emphasis added]

Consistent with the foregoing, local pension plans do, in many cases, supplement judges' retirement allowances.

For example, under the Charter Counties Act, 1966 PA 293, MCL 45.501 *et seq*, a county is empowered to establish a pension system. In particular, MCL 45.514 states:

> (1) A county charter adopted under this act shall provide for all of the following:
>
> . . . .

> (e) The continuation and implementation of a system of pensions and retirement for county officers and employees in those counties having a system in effect at the time of the adoption of the charter. The system provided under the charter shall recognize the accrued rights and benefits of the officers and employees under the system then in effect. *The charter shall not infringe upon nor be in derogation of those accrued rights and benefits*. The charter shall not preclude future modification of the system. [Emphasis added] [MCL 45.514(1)(e)]

Additionally, pension plans require the approval and adoption by the county board of commissioners, which is established by State law. See County Boards of Commissioners Act, 1851 PA 156; MCL 46.12a. Under the County Boards of Commissioners Act:

> (1) A county board of commissioners at a lawfully held meeting may do 1 or more of the following:
>
> . . . .
>
> (b) Adopt and establish a plan by which the county purchases or participates in the cost of an endowment policy or retirement annuity for a county employee or an employee of an office, board, or department of the county, including the board of county road commissioners, to provide monthly pension or retirement benefits. [MCL 46.12a(1)(b)].

Other Michigan laws provide additional examples of local retirement plans, that are established under state law. First, the Municipal Employees Retirement Act, 1984 PA 427, MCL 38.1501 to MCL 38.1558, provides for a retirement system for municipal and judicial employees and creates a retirement board. Second, the Combined Retirement Systems Act, 1967 PA 137, MCL 38.691, states that "Any 2 or more political subdivisions or other governmental instrumentalities created pursuant to state or local law may enter into an agreement to establish, combine, and finance retirement systems for their respective employees and officials, elected or appointed." Finally, the County Employees' Civil Service System Act, 1941 PA 370, MCL 38.401 to MCL 38.428, governs the establishment of a civil service system for all county employees.

The Calculation of Retirement Benefits by Local Units of Government Act, 1980 PA 443, MCL 38.841 to MCL 38.846, imposes requirements for the retirement benefits for certain employees. The requirements for computing retirement benefits for a judge employed by a local unit of government are:

> A local unit of government, for the purpose of computing retirement benefits of an employee who is a judge, shall use a figure which is the difference between the figure otherwise used under the local unit's retirement plan to compute retirement benefits, and those portions, if any, of the state salary standardization payment which are converted as an addition to the judge's state base salary for the purpose of computation of retirement benefits pursuant to sections 14a and 14c of Act No. 198 of the Public Acts of 1951, being sections 38.814a and 38.814c of the Michigan Compiled Laws. [MCL 38.842]

Thus it is clear that non-36th District judges are members of local retirement plans that guarantee benefits. These plans must be taken into account when evaluating whether Act 234 violates equal protection. To not consider the entire statutory funding system in determining whether the subject classification is substantially related to an important governmental objective would be to ignore the fact that 36th district court judges have their pension benefits fixed by Act 234 and do not have the benefit that non-36th district court judges have with their local funding units being able to increase the local pension portion of their pension benefits. Thus, it was error by the Court of Appeals to disregard the entire statutory system in reversing and remanding the matter back to the circuit court.

4. Even after incorrectly deciding to use the intermediate scrutiny test, the Court erred because it did not apply that test.

Despite this Court's determination in *Hughes* that the rational basis test must be used in judges' retirement matters, the Court of Appeals concluded that Plaintiffs' equal protection claims must be analyzed using the intermediate scrutiny test. Utilizing this test, challenged legislation will be upheld only if it is substantially related to an important State interest. *Doe*, 439 Mich at 662, n 19. Utilizing the intermediate test, two questions must be answered: "The

first question is whether the classification serves an *important* governmental interest. The second question is whether the classification is *substantially* related to the achievement of the important governmental objective." *Dep't of Civil Rights v Waterford*, 425 Mich at 191 (emphasis in original). Under this test, the burden of proof rests with the State, or here, Defendant Judges Retirement Board. *Id.*, at 196.

Even though the Court of Appeals erroneously decided that the intermediate scrutiny test is applicable in this case, it failed to apply that test. Instead, the Court of Appeals simply found an equal protection violation because "through the statute challenged, [the State] has guaranteed to the 36th District court judge retirees a level of retirement benefits that is not guaranteed to outstate judges." (App., p. 38a). The Court of Appeals failed to determine whether the discrepancy served an important governmental interest and whether it was substantially related to the achievement of an important governmental objective. *Id,* p. 191. Thus on this basis alone, the Court of Appeals' decision should be reversed.

5. Even if the intermediate test is used, there is no violation of the Equal Protection Clause.

While Defendants argue that the rational basis test must be used, even if the Court finds that the intermediate test must be used, the classification challenged here certainly served an important governmental interest that is substantially related to the achievement of an important governmental objective. *Dep't of Civil Rights., supra*, 425 Mich at p 191. That important governmental interest is, quite simply, the efficient operation of the Michigan court system.

The starting point of the State's reorganization of its courts was the creation of the 36th District Court in the City of Detroit, because that court system was in financial distress. The court operations in the City of Detroit were streamlined, and the disparity in judicial salaries between the judges serving that area was eliminated. Because part of this process involved

creating more seats on the newly established 36th District Court bench, consideration had to be given how to provide a pension system for all judges occupying a seat. Since Wayne County did not have a financial connection to the newly created court system due to the State taking over the funding scheme, the county pension plan was not appropriate for the judges.

Similarly, the judges could not become members of the City of Detroit pension plan because the judges were not city employees. In an effort to remedy this pension dilemma, the Legislature determined that all 36th District Court judges were to be become members of the Judges Retirement System. The placement of all judges from the newly created 36th district court into the Judges Retirement System and the enactment of the statute which requires that 3 ½% of their salary go toward retirement was part and parcel of the start of the reorganization of the court system.

Plaintiffs appear to recognize the important governmental interest promoted by the Court Reorganization Act. Plaintiffs' brief in support of motion for summary disposition, dated January 24, 2000, pages 7-8, states: "If one accepts that the object of the legislation in question was to unify and State fund the Michigan court systems . . . . [a]nd if one further accepts the reasoning that the standardization of judicial salaries was part of this attempt (as Defendants have claimed)." (App., p. 9a, Docket No. 96). After these statements Plaintiffs made no further suggestions that this part of the intermediate test has not been met; rather they focused their arguments on the second part of the heightened scrutiny test. The second prong of the heightened scrutiny test requires the State to establish that the classification is substantially related to the achievement of the important governmental objective.

In the instant case, Defendant Judges Retirement Board established a record through the use of legislative analyses and statutory references that explains the substantial relationship for

the difference in the treatment of 36th District Court judges and their counterparts in other judicial districts and the furtherance of an important governmental interest. The classification system created by the statute at issue was substantially related to the State's interest in streamlining the court system because it provided 36th District Court judges and non-36th District Court judges with the same potential to accrue a complete pension benefit, taking into account the amounts available through the State, as well as those available to non-36th District Court judges through their local funding unit.

III. There is no judicial remedy available to Plaintiffs.

A. Standard of review

This Court reviews questions of law *de novo*. *Bolt v City of Lansing*, 221 Mich App 79, 85; 587 NW2d 264 (1998).

B. Analysis

The Court of Appeals has determined that money damages are not an appropriate remedy for this type of claim for violation of equal protection. In *77th District Judge, supra*, the Court of Appeals dealt with essentially the same issues presented here. Namely, allegations that the Legislature created a disparate classification of out-state district court judges which a 77th district court judge claimed entitled him to money damages for salary he would have earned and a refund for retirement benefits he would not have paid if he had been a 36th District Court judge. The Court of Appeals, in *77th District Judge*, held "that an award of damages for past infringements of equal protection was entirely inappropriate and that all relief must be prospective in application." *77th District Judge*, 175 Mich App at 692. The Court of Appeals also concluded that money damages were not an appropriate redress for the equal protection violation established in this instance. *Id.*, at p 696. The Court stated that the parties did not cite any precedential authority for a damages remedy for the type of constitutional violation alleged,

and the Court noted that it was not aware of any such authority; deterrence of tortious conduct is not at issue in this matter; issues of judicial compensation appear to be uniquely directed to the policy-making expertise of the Legislature; and under Const 1963, art 1 §2, it is the Legislature which is empowered to implement enforcement mechanisms for equal protection. *Id.*, pp 695-696.

Similarly, money damages are not an appropriate remedy in the instant case. Plaintiffs have not cited any precedential authority for a damages remedy for the type of equal protection violation alleged here. Deterrence of tortious conduct is not at issue here. There is no allegation that any State agency has acted to deprive Plaintiffs of their constitutional rights; instead, the allegations go to the Legislature's enactment of the statutes at issue.

The explicit delegation of authority to the Legislature under Const 1963, art 1, §2, is an expression of the framers' and ratifiers' intent that the Legislature should make the difficult policy decisions regarding the scope of such rights and the appropriate remedies for violation of such rights. As Justice Brickley stated in his concurring opinion in *Smith v Dep't of Public Health*, 428 Mich 540, 632; 410 NW2d 749 (1987), *aff'd sub nom on other grounds in Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989):

> [t]he Equal Protection Clause of the 1963 Constitution (art. 1, §2) leaves its implementation to the Legislature. "[Under art. 1, §2] the legislature is empowered to create and define the 'civil rights' that it feels are deserving of protection. The nature and scope of these rights, and the remedies available for their violation, are left to legislative judgment." (Internal citation omitted).

Because "[p]olicy determinations are fundamentally a legislative function," *Blank v Dep't of Corrections*, 462 Mich 103, 116; 611 NW2d 530 (2000), and because the goal of construing our Constitution is to give effect to "what law the people have made," *Id*, at p 133. This Court ought to defer to Const 1963, art 1, §2's delegation provision and the Legislature's failure to

provide for money damages in this instance, recognizing instead that a remedy has been provided in the form of a defined contribution plan. MCL 38.2110a. Deference to the policymaking expertise of the legislative branch of government is necessary even where such policy decisions may result in there being less than a complete statutory remedy. *Smith, supra*, 428 Mich at 631. See also *North Ottawa Hospital v Kieft,* 457 Mich 394, 408 n 14; 578 NW2d 267 (1998). To do otherwise would allow an "end-run" around Const 1963, art 1, §2's delegation to the Legislature to determine what remedies should be available in the broad and amorphous area of equal protection rights.

The courts are subject to the separation of powers set forth in Const 1963 art 3, § 2, and cannot compel legislative action or encroach upon the functions of the legislature. See *Randall v Meridian Twp Bd,* 342 Mich 605, 608; 70 NW 2d 728 (1955) and *Bartkowiak v Wayne Co,* 341 Mich 333, 343; 67 NW 2d 96 (1954). In addition, the legislative power of the State is vested in the senate and House of Representatives pursuant to Const 1963, art 4 § 1, and they alone are responsible for providing for remedies for equal protection violations.

The recent case of *Lewis v Michigan,* 464 Mich 781; 629 NW2d 868 (2001) is instructive. In *Lewis,* the plaintiff alleged equal protection violations by the Michigan State Police in their policy of promoting minorities. This Court held that:

> [W]e agree that the language of the last sentence of Const 1963, art 1, § 2 weighs against recognition of a judicially adopted damages remedy for violation of that constitutional provision. Accordingly, we conclude today that the portion of Const 1963, art 1, § 2, commonly referred to as the state Equal Protection Clause, precludes us from adopting such a judicially crafted remedy.
> *Id,* 464 Mich at 785

This Court further stated:

> On its face, the implementation power of Const 1963, art 1, § 2 is given to the Legislature. Because of this, for this Court to implement Const 1963, art 1, § 2 by allowing, for example, money damages, would be to arrogate this power given

expressly to the Legislature to this Court. Under no recognizable theory of disciplined jurisprudence do we have such power.

Moreover, our conclusion that the language of Const 1963, art 1, § 2 does not allow us to judicially create a money damages remedy for a violation of this constitutional provision is consistent with the view expressed by Justice Brickley, joined by Justice Riley, in *Smith*:

> [T]hose sections of the 1963 constitution, comparable to the provisions of the 1908 Constitution under which plaintiff sued, indicate that we should defer to the Legislature that question whether to create a damages remedy for violations of a plaintiff's rights to due process or equal protection. For example, the Equal Protection Clause of the 1963 Constitution (art 1, § 2) leaves its implementation to the Legislature.
> *Id,* 464 Mich at 787

The Plaintiffs stated in their Brief in Opposition to the Defendant's Application for Leave that the matter should be remanded even if the answer is clear, simply to make a record for the appellate courts to review. There simply is no need to waste valuable legal resources on an issue that has been already decided by this Court. This Court should follow its line of decisions and dismiss the Complaint.

The Court of Appeals ducked this important issue by referring cryptically in the last sentence of the May 10, 2002, opinion and order and in footnote 17 that there may not be any "appropriate remedy" for the alleged violation of equal protection by Defendants. As stated above, the question if there is any appropriate remedy has already been answered in the negative by this Court and the Court of Appeals. A remand to the Circuit Court where the answer is clear is a waste of judicial resources, and Defendants request this Court decide this significant issue.

The Complaint seeks to have this Court declare Act 234 unconstitutional and to enjoin its effect. (App., p. 47a). If this court were to grant such relief, then the approximately 1,000 members and their beneficiaries may not be able to receive any state retirement benefits. This result would be devastating to these retirees, particularly in those situations like Judge Fox's

where he now receives more in retirement benefits than a comparable 36th District judge who is retired. Thus granting this relief requested by the Plaintiffs would harm retirees, not help them. Moreover, such injunctive relief could be contrary to the provisions of Const 1963, art 9, § 24, which prohibits the impairment of retirees' accrued benefits. *Association of Professional and Technical Employees v City of Detroit,* 154 Mich App 440, 444-446; 398 NW2d 436 (1986)

The Plaintiffs claim that they want declaratory and injunctive relief in their Complaint, yet the result that they truly want, as set forth in the Complaint, is "fully state-funded pensions." This will require substantial financial expenditures by the Legislature, and as stated above, it is the Legislature, and not the courts that may grant monetary relief as requested by the Plaintiffs.[6]

Thus, this Court should deny the relief requested in the Complaint in total and dismiss the matter in its entirety.

[6] The issue of subject matter jurisdiction was raised by the Court of Appeals for consideration on remand, and this Court did not ask the parties to brief this issue, so the Defendants are not briefing this issue at this time.

CONCLUSION

The federal and state courts apply the rational basis test to social and economic challenges under the Equal Protection Clause. The issue of retirement benefits for the state judiciary is a social and economic claim that should be reviewed by this Court under the rational basis test. The Court of Appeals erred when it decided that the intermediate scrutiny test should be applied. The record clearly establishes that under the rational basis test, the Judges Retirement Act is constitutional, and Plaintiffs' equal protection rights have not been violated.

Even under the intermediate scrutiny test, Plaintiffs' equal protection rights have not been violated as the entire statutory scheme must be reviewed and taken into consideration in determining whether there has been a violation. The evidence presented by Defendants establishes that the entire statutory scheme relating to judges' retirement benefits compels the conclusion that there has been no violation of the Equal Protection Clause, regardless of which test is applied.

In addition, there are no remedies available to Plaintiffs for an alleged violation of the Equal Protection Clause, because only the Legislature can prescribe remedies for any such violations. Finally, the Legislature has exercised its authority and adopted a new defined contribution plan that, for over five years now, has treated new judges equally for purposes of retirement benefits. Thus, the alleged discriminatory treatment of non-36th district judges has been eliminated on a prospective basis.

RELIEF SOUGHT

Defendants request that this Court reverse the Court of Appeals decision of May 10, 2002, and affirm the Circuit Court's dismissal of Plaintiffs' Complaint.

Respectfully submitted,

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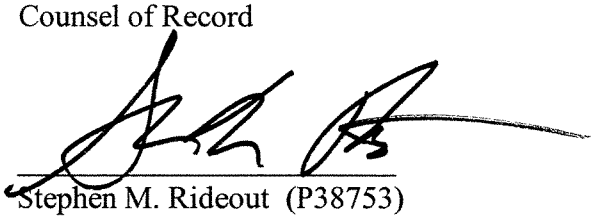
Solicitor General
Counsel of Record



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